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APPEARANCES:

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- and -
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1 P R O C E E D I N G S

2 THE CLERK: United States vs. Aaron Swartz, Criminal
3 No. 11-10260. Court is in session. You may be seated.

4 THE COURT: Good afternoon, counsel. I understand --
5 do we have somebody on the phone?

6 MR. PURCELL: Yes, your Honor.

7 THE COURT: Okay. And that would be?

8 MR. PURCELL: This is Dan Purcell from Kecker & Van
9 Nest. I'm one of the lawyers representing the defendant, Aaron
02:08 10 Swartz.

11 THE COURT: Good afternoon, Mr. Purcell. In the
12 courtroom we have -- starting on my left?

13 MR. HEYMANN: Your Honor, Steve Heymann on behalf of
14 the government.

15 THE COURT: Mr. Heymann.

16 MR. PETERS: Good afternoon, your Honor. Elliot
17 Peters, appearing on behalf of Aaron Swartz, who is present and
18 sitting right here.

19 THE COURT: Mr. Peters and Mr. Swartz. And?

02:09 20 MR. PINEAULT: Good afternoon, your Honor. Michael
21 Pineault from Clements & Pineault, also for Aaron Swartz.

22 THE COURT: Mr. Pineault, good afternoon to you.

23 We are here at the request of -- the joint request of
24 counsel that we have a status conference to determine whether
25 or not an evidentiary hearing on the several pending motions to

1 suppress would be appropriate and, if so, what the scope of
2 such a hearing might be.

3 I have reviewed the papers that have been filed in
4 this regard, and I think maybe I could start by asking Mr.
5 Peters to explain to the Court why it is that we need such a
6 hearing and on what particular issues do you feel there needs
7 to be evidence presented?

8 MR. PETERS: Thank you, your Honor. I think that
9 there's three issues that require an evidentiary hearing. One
02:10 10 is, there's a motion that we filed relating to a 34-day delay
11 in obtaining search warrants to search a computer and two
12 electronic storage devices. The government has responded with
13 various factual arguments about why that delay is reasonable.
14 I suppose your Honor could grant that motion without a hearing,
15 but in order to entertain the government's arguments and
16 explanations, I think that there would have to be fact-finding
17 about the claims of reasonability with respect to that delay.
18 That's one.

19 Two is, there's an argument that's been put forth by
02:10 20 the government that Mr. Swartz was a trespasser on the MIT
21 campus, both in the context of using the MIT computer network
22 as a guest and also in being physically present in a building
23 and in a room on the campus. That is a factual issue, also,
24 that would require the taking of testimony about MIT's policies
25 and procedures. It has a somewhat unusual open policy to its

1 campus. It has an open computer network. So we believe the
2 testimony would prove that the government's claim that he was a
3 trespasser is not accurate in the context of this search
4 warrant.

5 And then the third topic, your Honor, would be the
6 issue of whether Mr. Swartz had an objectively reasonable
7 expectation of privacy in a computer that was left on the MIT
8 campus, in a room on the MIT campus. The government takes the
9 position that no one could have such an objectively reasonable
02:11 10 expectation of privacy. And for some of the reasons that -- it
11 overlaps a little bit with some of the trespasser issues. It's
12 our view that he did, and certainly could have had, an
13 objectively reasonable expectation of privacy based on how the
14 MIT campus works and so on. So I think those are the three
15 main issues that --

16 THE COURT: How do you respond to the government's
17 position that this is really just a pretrial in which you get a
18 free discovery of all of the government's evidence?

19 MR. PETERS: Well, I guess the simplest way to respond
02:12 20 is to say that that's not the way we're thinking. We filed
21 these motions because we believe that they have merit. And I
22 think the first one I mentioned -- I think it would be possible
23 for the Court to grant our motion about the 34-day delay in
24 seeking a warrant without having a fact hearing, but I can
25 represent to your Honor that we're here to litigate these

1 motions to suppress and not for some reason that has nothing to
2 do with that. And, obviously, in a suppression hearing, if
3 they objected and your Honor concluded that we were pursuing
4 lines of inquiry unrelated to the suppression motion, which we
5 have no intention of doing, your Honor would sustain an
6 objection and tell us what to do, and that would be the end of
7 that. I think there's very little risk of that, and that's
8 certainly not our intention.

9 The investigation in this case took place in a way
02:13 10 where the government chose not to seek court approval for a lot
11 of its actions. They finally got a warrant much later, but
12 they didn't get any type of Title III or warrant or anything
13 beforehand, and so it can't really be a surprise to them that
14 we would assert our rights to seek to suppress some of the
15 fruits of these seizures which took place without judicial
16 authorization. And that's all we seek to do, your Honor.

17 THE COURT: Mr. Heymann, why shouldn't I allow such a
18 hearing to the extent that the defendants have requested it?

19 MR. HEYMANN: Your Honor, if I may, let me address
02:14 20 them sequentially. The first, with respect to the delay on the
21 search warrant, I won't reargue the government's position that
22 there is no need to have a hearing on that simply because the
23 evidence was seized and held as physical objects and as
24 evidence, and the Court can make its decision based solely on
25 that point. And I think that point is uncontested.

1 But to the extent that the Court wishes additional
2 fact-finding on the question of why there was that 34-day
3 period and for the Court to have a complete picture as it makes
4 its ruling, that set of facts is a very modest set of facts and
5 quite constrained. It's the question of putting an agent on
6 the stand and saying what's going on in that intervening time.
7 As the government said, and we'll argue later, it's not
8 necessary to reach that point, but it's a fairly constrained
9 set of facts.

02:15 10 With respect to where the hearing would move from a
11 hearing that is directed to factual matters that would inform
12 the Court to a pretrial trial of the case is on this question
13 of the trespasser. And I want to distinguish two parts here:
14 the question of whether or not there was legitimate access to
15 the physical campus or the physical room on the physical campus
16 and the question of whether or not there was legitimate access
17 to the network.

18 There is no -- because the government is not going to
19 seek to offer in evidence the -- what has been alternately
02:15 20 referred to as the packet capture, the mirroring of the
21 communications going back and forth -- the monitoring of the
22 communications going back and forth to the laptop for about a
23 day and a half -- because the government is not going to seek
24 to offer that, because it had no -- while there unquestionably
25 is a couple of emails saying, We've seen this and we've seen

1 that, the government -- I literally don't have a very good idea
2 what was even in that packet capture. Because it was not used
3 in the investigation -- it wasn't used in any further search or
4 warrant or collection -- there is no reason to address that
5 packet capture.

6 We candidly addressed it because we wanted to show
7 what MIT was doing was perfectly proper, perfectly legitimate;
8 what the government was doing was perfectly proper, perfectly
9 legitimate. But that packet capture evidence is not going to
02:16 10 be offered. What is derivative from it is not going to be
11 offered. There isn't anything derivative from it. That's why
12 it's not going to be offered.

13 So the sole question there is whether or not the
14 routing, addressing information, the stuff that looks like pen
15 register information except it's a computer, that's routinely
16 collected by MIT and routinely collected on their network, can
17 be provided. It's the government's position that that is
18 wholly resolvable as a matter of law. It's been resolved by
19 Forrester in the Ninth Circuit as a matter of law. It was
02:17 20 resolved by Smith. It was resolved by Miller by the Supreme
21 Court.

22 Once you do that, there is the whole extensive part of
23 the trial, which is what -- how did he get on the network? Was
24 it legitimate? Was it illegitimate depending on whose
25 perspective you're looking at it from?, doesn't get replayed.

1 That part, the Court does not need an evidentiary hearing on
2 because, for all the reasons we argue in our brief, that's not
3 necessary.

4 THE COURT: But you're not opposing an evidentiary
5 hearing as to whether there was a physical trespass in the
6 so-called closet or on the premises of MIT?

7 MR. HEYMANN: What I was going to go on to say is that
8 what is -- what remains, which is his third question, the
9 reasonable expectation of privacy of the laptop and the hard
02:18 10 drive and the closet, the question of: What did the government
11 do when it got -- how did -- the government goes in. It sees
12 -- it's shown a box by MIT employees. It goes under the box.
13 It looks at things. What is the government doing that is -- as
14 Mr. Peters says, there is an activity that either is or is not
15 a Fourth Amendment cognizable search going on then. And if it
16 is a Fourth Amendment cognizable search, there either is or is
17 not an exception.

18 That is, again, a fairly concise amount of facts; that
19 while the government does not believe it's necessary to go in
02:19 20 in great detail for the reasons that it's argued, it's
21 perfectly reasonable to have a constrained hearing so that the
22 Court has -- is fully informed as to what took place there and
23 the nuances of what was seen by different people at different
24 times. Obviously, there's photographs of that.

25 So, in sum, where this expands is the moment you get

1 into the whole history of what's going on and off the network,
2 which is not necessary to go into to resolve the matters before
3 the Court.

4 THE COURT: What about the abandonment issue?

5 MR. HEYMANN: Again, that's a physical question. It's
6 a question -- these are the -- these are the -- differentiating
7 between what is happening, as it were, in the physical world,
8 what's being -- are there "no trespassing" signs up? Where is
9 this closet? How do you get into this closet? Is it locked?
02:20 10 Is it not locked? What do you see when you go in? What did
11 the government do physically when it went in? What did it see?
12 What did it know? Did it open something? Not open something?
13 Those set of physical facts are a different set of facts than
14 what was he doing on the network at the time, which is the
15 heart of the trial itself.

16 THE COURT: All right. I think I understand the
17 government's position. You would then say that there ought not
18 to be any evidentiary hearing with respect to what expectations
19 of privacy, if any, a guest user obtained through access to the
02:20 20 MIT's network?

21 MR. HEYMANN: We've certainly argued in, I think, our
22 fourth- or fifth-level argument with respect to the motion to
23 dismiss, No. 1, the motion -- motion to dismiss, I'm sorry --
24 motion to suppression, No. 1, that because he was a trespasser
25 on the network, he also didn't have any right of privacy. But

1 that whole thing is resolved, I submit to the Court, at the
2 constitutional level and at the statutory level long before you
3 get down there.

4 THE COURT: All right. I'll give Mr. Peters a chance
5 -- a brief chance to rebut and tell me why what Mr. Heymann
6 says doesn't make good sense; in other words, have a limited
7 evidentiary hearing with respect to the physicality, if you
8 will, of trespass and/or abandonment but not beyond that.

9 MR. PETERS: Well, first of all, the first point is
02:21 10 the issue about the delay on the search warrant, and what Mr.
11 Heymann said was --

12 THE COURT: Why isn't that a matter of law?

13 MR. PETERS: I think it could be a matter of law
14 because the law says that a delay of that amount in even
15 seeking a search warrant is a basis for a suppression. Their
16 response is factual. So I think if it were purely a matter of
17 law, then the Court would have to grant the suppression motion.
18 But the government's arguments against it are factual.

19 THE COURT: You agree with that, Mr. Heymann?

02:22 20 MR. HEYMANN: Your Honor, I don't agree with that. I
21 think the -- the government's position, just to put the facts
22 on the table, is simply that there's a -- I ask Mr. Peters to
23 bear with me on this -- that there has been a theft of data
24 from JSTOR. You can follow it down the wires. It connects to
25 a laptop. It connects to a hard drive. There are pictures of

1 his client -- again, I ask him to bear with me -- getting this
2 laptop, getting this hard drive. And for that reason, those
3 objects are physically evidence of the crime, and we could
4 simply seize it and keep them until trial for that reason, and
5 that distinguishes his whole line of cases.

6 But I think that this area is one that is so easy, in
7 the course of an evidentiary hearing, to put on what was found,
8 where, to be able to put on before the Court the evidence that
9 the wires coming down comes into the laptop, comes into the
02:23 10 hard drive, so that the Court has that image in front of it as
11 it's assessing the government's argument; to hear, to the
12 extent that the Court wants to, what's going on in the
13 investigation in the intervening time. The government contends
14 it's not material, but the Court would have that evidence to
15 assess should it want to.

16 It's such a small piece that we should go ahead and do
17 it as part of the factual hearing that he's requesting. I
18 don't think it's necessary. I just think it's benign.

19 THE COURT: All right. Mr. Peters.

02:24 20 MR. PETERS: It sounds like we agree that there should
21 be a hearing about that.

22 I just wanted to make one observation. The argument
23 that this is a physical object, that the computer -- you know,
24 the computer's evidentiary significance is just because it's a
25 physical object, like a gun, say. We just disagree with that,

1 your Honor. The evidentiary significance of a computer is
2 what's inside it. The evidence that they hope to offer is the
3 result of a search because -- which we claim was unlawful
4 because of the delay in getting the warrant, which took place
5 of the contents, the hard drive, what was on that computer. If
6 all they wanted to offer was the fact that here's a computer
7 and put it into evidence, they wouldn't bother, and we wouldn't
8 have a problem.

9 What we're here moving to suppress is a search of the
02:24 10 hard drive and the extraction of a bunch of data off that
11 computer, which we contend took place in violation of the
12 Constitution because of the delay. And the arguments that the
13 government's making, and I think that Mr. Heymann's
14 presentation kind of underscores that, are factual.

15 THE COURT: All right. I --

16 MR. PETERS: But -- I'm sorry, your Honor.

17 THE COURT: I thought you'd finished. But go ahead.

18 MR. PETERS: No. I wanted to turn to the trespasser
19 issue and the expectation of privacy issue are also factual
02:25 20 issues that turn on access to the building, access to the room,
21 I mean, what happened in connection with the activities that
22 are alleged and then that give rise to the searches that took
23 place without a court order. And I really don't hear Mr.
24 Heymann disagreeing with us about that either. He keeps
25 talking about a narrow -- you know, a circumscribed hearing.

1 And we don't have any anticipation of coming into your Honor's
2 courtroom and trying to ask a lot of questions that aren't
3 directed to the appropriate matter of the hearing. There may
4 be some overlap between issues that the jury would have to
5 determine and the issues that the Court has to consider in
6 connection with a suppression hearing, but I think that's
7 common in a criminal case when you have some constitutional
8 issues in a suppression motion. But we would -- we're here to
9 focus on and litigate the issues presented by the motion.

02:26 10 THE COURT: I think I've heard enough about that. I
11 agree that the Court will have a limited, circumscribed
12 evidentiary hearing on the motions to suppress. The Court is
13 entering into a time of unbelievably busy trials next month and
14 for the several months thereafter. So I am -- this is not
15 going to be an unlimited hearing. It's going to be limited in
16 time.

17 And, really, I've looked at my calendar before I came
18 on the bench, and the only day I have available in the next
19 time frame that would be appropriate for this is the last
02:27 20 Friday of January. That's January 25th. And the afternoon
21 thereof is what I am going to make available for this hearing.
22 In other words, it's not going to exceed three hours or so;
23 and, therefore, the time will have to be divided between the
24 two parties so that you can order whatever facts you want to
25 get before me in such a way as to allow your opponent equal

1 time but get it done in three hours. So we'll start either at
2 -- I suppose we could start at 1:00 on Friday, January 25th.
3 And we will be done with this hearing before the end of the
4 afternoon, hopefully, by 4:00 but, if not, before 5:00.

5 And the issues, I am going to limit to what Mr.
6 Heymann outlined with respect to the delay in getting the
7 search warrant and the facts that he believes will demonstrate
8 the appropriate behavior of the government; the trespass issue
9 and what I have defined as the abandonment issue, involving the
02:28 10 computer that was left in the closet. I don't know whether
11 that will actually get around to a concern of the objectivity
12 of the reasonable expectation of privacy, but I'm not going to
13 decide that right at this moment. But the hearing is, I think,
14 obviously going to be a limited one, and we will then go
15 forward from there.

16 I understand that both sides feel that at that stage a
17 trial on February 4th is going to be impossible. I agree with
18 that, but I also have to forewarn counsel that my schedule over
19 the next six months is so busy that I don't have a lot of
02:29 20 options. And I'm not going to put this trial off until June,
21 as requested by the defendant. There's no reason for a
22 six-month delay. There is reason for some delay.

23 With respect to the request of designating experts, I
24 think that was one you wanted until the end of February. I'm
25 going to split the difference with you, Mr. Peters, and give

1 you till -- maybe till the date of the hearing that we're going
2 to have, January, to designate your experts. But the trial --
3 the only day that I'm going to be able to afford for this trial
4 that's not February 4th which, of course, we've blocked out, is
5 the very first day of April, April 1st, which is a Monday. I
6 don't know how long this trial is expected to last. What is
7 your best guess, Mr. Heymann?

8 MR. HEYMANN: Less than two weeks -- less than ten
9 trial days, but how many depends on the defense case and how
02:30 10 much cross-examination. But we certainly can accomplish it
11 within ten days.

12 THE COURT: Mr. Peters.

13 MR. HEYMANN: Ten trial days.

14 MR. PETERS: That sounds right, your Honor.

15 THE COURT: Okay. That's what I intend to do. Is
16 there any problem with the expressed intentions of the Court?
17 Mr. Heymann?

18 MR. HEYMANN: First of all, with respect to
19 scheduling, I already conferred with my co-counsel, Mr. Scott,
02:30 20 who -- Mr. Scott -- Mr. Garland, Scott Garland, who couldn't be
21 here today, and that works fine with both of our schedules.

22 And when the Court said the trespass issue, I just
23 want to make sure I'm focused -- are we focusing on the
24 physical trespass.

25 THE COURT: Yes. We're focusing on the physical

1 trespass, not the computer aspect of it.

2 MR. HEYMANN: Okay. Thank you.

3 THE COURT: Mr. Peters.

4 MR. PETERS: Your Honor, I'm just double-checking my
5 calendar. I turned off my device in court because I find it
6 always rings if I leave it on. So I think it's silenced, so I
7 just turned it off. If your Honor could just bear with me. I
8 think that those dates are fine with me, but I just wanted to
9 double-check.

02:31 10 THE COURT: Yes. I'll give you a minute.

11 MR. PETERS: Your Honor, thank you for your patience.
12 Those dates are fine with us.

13 THE COURT: I perhaps cut you off, Mr. Peters, when we
14 were discussing the potential issue of what expectations of
15 privacy, if any, a guest user obtained through access to the
16 MIT's network and whether or not that would necessarily be a
17 subject matter of any evidentiary hearing. Had you completed
18 your remarks in that regard?

19 MR. PETERS: I think I had, your Honor. The only
02:33 20 source of some confusion in my mind was that I heard Mr.
21 Heymann say -- and I'm trying not to put words in his mouth,
22 but the evidence about the packet capture may not be used
23 because, in the motions, there were certain things in the
24 government's opposition that they clearly identified and said,
25 We're not going to put that in in our case in chief.

1 THE COURT: I think he just repeated that here today.

2 MR. PETERS: The packet capture wasn't one of those
3 things. I just wanted to know whether that was a different
4 position.

5 THE COURT: Mr. Heymann.

6 MR. HEYMANN: No. To be -- at the risk of restating
7 it to be clear, the government does not intend to offer in its
8 case in chief any of the evidence that was obtained through the
9 packet capture. And I just want to be clear as to which packet
02:33 10 capture in case that's an issue. On January 4th when the
11 computer -- when the laptop computer was found, first MIT on
12 its own, as we understand it, though there's a little bit of
13 ambiguity about that, and then certainly shortly thereafter
14 with the approval of the government, started monitoring, making
15 an exact duplicate of all the communications going back and
16 forth to the Acer laptop for a day. Those communications,
17 which we've referred to in the briefing as the packet capture,
18 are not going to be offered in evidence in the government's
19 case in chief.

02:34 20 I want to just be very clear that we are intending to
21 offer significant amounts of the information that shows the
22 routing information, the tracking information, the sign-on
23 information, all of the non-content information. But the
24 government --

25 THE COURT: The so-called pen register information?

1 MR. HEYMANN: Part of it -- I refer to it as pen --
2 the computer version of pen register information. But it's
3 also like, when somebody signs on and they say, My name is such
4 and such and my address is such and such, they're providing
5 information. That non-content information, or that information
6 voluntarily given to the network, we do intend to offer.

7 THE COURT: Okay. I think that's clear.

8 MR. PETERS: It is clear now, your Honor. Thank you.
9 And so I do think the issue of a reasonable expectation of
02:35 10 privacy as part of Fourth Amendment standing then isn't in play
11 with respect to the access to the computer system.

12 THE COURT: Now, before we adjourn, you have filed a
13 separate matter, but -- you have filed a motion to dismiss, Mr.
14 Peters, the fraud count -- actually, the two counts that have
15 -- that relate in that regard. Rather than schedule another
16 hearing -- you may not be prepared today, but I would hear both
17 sides briefly if you wish to supplement the papers that you
18 have filed with the Court with respect to the motion to
19 dismiss, which is No. -- Docket No. 64, the wire fraud counts.
02:36 20 Do you wish to supplement your papers at all, Mr. Peters?

21 MR. PETERS: No, your Honor. We'll submit the matter
22 based on the papers that we filed.

23 THE COURT: All right. Mr. Heymann?

24 MR. HEYMANN: As will we, your Honor.

25 THE COURT: Fine. I will take that matter under

1 advisement and try to resolve that as -- in due course, before
2 the hearing of the -- involving the motions to suppress.

3 Is there anything else that needs to come to my
4 attention before we recess for the day.

5 MR. PETERS: Only that in light of the Court's busy
6 schedule that you have a happy holiday.

7 THE COURT: Thank you. You too.

8 MR. HEYMANN: Thank you, your Honor.

9 THE COURT: I take it you're not here for ulterior
02:37 10 motives, to attend the football game on Sunday night?

11 MR. PETERS: I don't want to get myself in trouble
12 with anybody. Actually, your Honor, I'm hoping to go back and
13 attend my law firm's Christmas party in San Francisco this
14 evening.

15 THE COURT: I think that's a better choice for a 49ers
16 fan.

17 MR. PETERS: It should be a heck of a game, though.

18 THE COURT: Thank you, counsel. We have another
19 hearing.

02:37 20 MR. PETERS: Thank you very much, your Honor.

21 (Whereupon, at 2:37 p.m. the hearing concluded.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/Cheryl Dahlstrom

02/22/2013

Cheryl Dahlstrom, RMR, CRR
Official Court Reporter

Dated